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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 287.

AL POLIZZI, PETITIONER,

VS.

COWLES MAGAZINES, INC., RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

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OPINION BELOW.

The opinion of the Court of Appeals (R. 154-160) is reported at 197 F. 2d 74.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 23, 1952 (R. 115). Petition for Certiorari was filed August 20, 1952, and was granted October 20, 1952. The jurisdiction of this Court is conferred by Title 28, U. S. C., Sec. 1254.

QUESTIONS PRESENTED.

1. Where an Iowa corporation, the owner of three nationally distributed magazines employed a circulation staff composed of salaried circulation head or district men, formerly called assistant circulation managers and where two of such district men performed services in the same capacity for the corporation in the territories assigned to them in the State of Florida and where service of a summons of a Federal District Court of Florida was served on one of such district men—who was assigned an area composed of Florida, South Carolina, Mississippi, Alabama and Georgia—whose duties were to continually travel such territory to check with regular, systematic, and periodic frequency in his Florida territory the retail sales-outlets of independent wholesale magazine dealers, arrange with such retail sales-outlets for better display of such magazines and provide and arrange poster display advertising in such retail-outlets promoting the sales of the magazines and see that sufficient numbers of copies were provided retail-outlets, promoting generally the sales and circulation of such magazines in such territory, periodically mail written reports to the New York office of respondent relating to complaints of retailers of insufficient copies or lack of promptness in delivery, meet with wholesale distributors to check and correct complaints of retail-outlets

and that such wholesalers use special poster display advertising material furnished by respondent together with the solicitation of subscriptions by independent agents in Florida and sent direct to respondent and collection by such agents of subscription charges from subscribers in the State of Florida and transmission of such collections less commissions were mailed directly to the respondent, together with the acceptance of direct mail subscriptions from Florida by respondent in Iowa and the delivery of magazines by mail directly to said subscribers, were such corporate activities sufficient to subject respondent to such summons of the United States District Court in the State of Florida in an action of libel based on libelous statements concerning petitioner, a resident of Florida and published and broadcast in the State of Florida in Look Magazine, one of said three national magazines owned by respondent?

2. Did the Court of Appeals err in failing to follow herein the formula of this Court laid down in *International Shoe Company* v. *State of Washington, Office of Unemployment Compensation and Placement,* (1945) 66 S. Ct. 154, 326 U. S. 310, that due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice?

STATUTES INVOLVED.

The governing statute of Florida, Florida Statutes Annotated, Section 47.17, provides that if a foreign corporation shall have none of the following officers or agents in the state, viz.: president, vice-president, or other head of

the corporation, or cashier, treasurer, secretary or general manager, any director or officer or business agent, resident in the state, then

> "service may be had upon any agent transacting business for it in the State."

The provisions of the Federal Rules of Civil Procedure pertaining to service of process on the questions raised are found in Sub-sections (d) (3) and (d) (7) of Rule 4, 28 U. S. C. A., which provides as follows:

> "(d) Summons: Personal Service. The summons and complaint shall be served together. The Plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows: * * *
>
> "(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. * * *
>
> "(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state."

STATEMENT.

The libel suit of petitioner, a resident of Florida, was filed in a state Court of Florida to recover damages of respondent, an Iowa corporation, as the owner of the national weekly magazine "LOOK" after an issue of the magazine charged petitioner with being a member of the Mafia, a criminal gang (R. 4-15). Jurisdiction of the state Court was contested (R. 15-22) and the case was removed by respondent to the United States District Court (R. 3). Thereupon a federal summons and copy of complaint was served on Paul T. Briardy (R. 41) as a managing agent of respondent transacting business for it in Florida. The return of the United States Marshal recited Briardy denied he was such agent or was transacting business for respondent in Florida or was a person authorized to accept process for respondent (R. 41).

Depositions of Paul T. Briardy (R. 42-70) and Marvin C. Whatmore, Vice-President and business manager of respondent (R. 70-104) were taken by petitioner for the purpose of establishing respondent's corporate activities in Florida so as to be subject to process in that state and that Briardy was an agent transacting business for it in Florida.

The respondent moved in the Federal District Court to dismiss or in lieu thereof to quash the return of the United States Marshal's service of summons upon Briardy (R. 105-106), which motion, as amended (R. 106), was granted August 29, 1951 (R. 107).

The relevant facts reflected by the depositions are condensed in the following outline.

The respondent is an Iowa corporation and maintains offices in Des Moines, Iowa (R. 71), and in other cities not

in Florida (R. 72). It has not qualified to do business in Florida, has no bank accounts, officers, directors or offices in Florida (R. 97).

Respondent owned and published three nationally distributed magazines, viz.: Look, Flair and Quick magazines (R. 58).

Orders for Look magazine for example were received from wholesale distributors and were sent to a bindery, an independent contractor, in Chicago, which filled such individual orders by shipping such magazines direct to independent wholesalers by common carriers (R. 95).

The magaines were distributed in Florida to news stand retail dealers by two independent wholesalers (R. 75-77) in the state of Florida. In addition full and part time independent subscription salesmen augmented retail news stand sales in Florida by mailing copies direct to subscribers by respondent (R. 92-93). The collections, less commissions, were remitted directly by mail to the respondent, together with the acceptance of direct mail subscriptions from Florida by respondent in Iowa and the delivery of magazines by mail directly to such subscribers (R. 85).

Circulation was important as a source of revenue and was used as a basis for advertising rate structure (R. 73). Respondent employed a circulation staff of salaried circulation road or district men formerly called assistant circulation managers (R. 79-80). Two of such district men performed services for the respondent in the same capacity in the territories assigned to them in the State of Florida (R. 68). Briardy, one of such two district men operating in Florida on behalf of respondent, was a district man who regularly travelled his assigned territory of Florida, South Carolina, Mississippi, Alabama and Georgia (R. 46,

79). Briardy was the agent of respondent served herein with the federal summons and copy of complaint of the federal district court.

He was hired on a salary basis and allowed in addition certain expenses for travel (R. 48-50). His duties were to check with regular, periodic frequency retail sales-outlets of the two wholesalers (R. 46, 51) in Florida, and arrange with retail outlets for better display of the magazines of respondent (R. 51, 56) and to provide for and arrange poster display advertising in such retail outlets (R. 51) promoting the sales of respondent's magazines and insure that sufficient numbers of copies were provided retail outlets. His duty also was to generally promote the sales and circulation in his territory in Florida, and periodically mail written reports to respondent relating to retail-outlet complaints (R. 51-55) as to delivery or insufficient copies of magazines. He further met with wholesalers (R. 55-56) to check and correct complaints of retailers and urged the wholesaler to use poster advertising material furnished by respondent (R. 56) and correct complaints of retailers (R. 56). His function was to increase circulation of respondent's magazines to the best of his ability (R. 51, 47, 54-55, 58-59). Advertising displays were also sent direct to Florida retailers by respondent's New York office and were included in individual magazine bundles to the independent wholesalers (R. 82).

Briardy's time was fairly well proportioned among the five states of his territory and he spent considerable portion of his time in Florida (R. 68, 69). He tried to follow a regular itinerary (R. 51).

Briardy testified he had no place of residence; he travelled out of a suitcase from town to town; received his mail at a letter drop in Miami, Florida, and all other mail in hotels (R. 43).

In following a regular itinerary in Florida he checked the news dealers in small towns as well as the large cities (R. 51). For example, while in the City of Miami he would generally start out and cover 40 dealers, 40 stores that handle magazines in the course of a day (R. 51). He would even count the magazines to have some idea as to how the sale was progressing. If the display was not satisfactory he would personally adjust the display of respondent's magazines with the cooperation of the retail dealer (R. 51). He also stated he put up poster advertising at such retail stores in Florida (R. 52) and obtained such advertising material and posters from the magazine wholesaler in Miami the American News Company or occasionally had advertising material sent to him direct by the New York office of respondent.

The respondent also used Briardy on occasion to use his discretion on behalf of respondent to promote the introduction and sale of its new magazine Flair to people of Florida during February, 1951, during the Florida winter season (R. 57, 58). Briardy testified he was called away from another state in his territory by respondent while on his scheduled itinerary and stated (R. 58):

> "* * * When we first put Flair on the market, which was in February of this year, the fact that it was the Winter season here, and a class publication like Flair which sells for 50 cents, which in all probability would have a very good sale in this town and surrounding area, they thought it would be best I stay in this area to see how the sale was getting along, and make sure it was being promoted properly."

Briardy then stated he performed for the respondent in Florida the same duties for Flair and Quick magazines of respondent that he performed for its Look magazine (R. 58) using the same methods to promote their circulation in Florida. Briardy also testified he contacted dealers in

many towns and cities in Florida in Miami, Miami Beach, Key West, Ft. Lauderdale, West Palm Beach, Hollywood, Delray, Orlando, Daytona Beach, Jacksonville, St. Augustine, Tallahassee, St. Petersburg, Clearwater, Sarasota, Tampa and several other communities not named (R. 67, 68).

When asked if he covered the City of Pensacola (R. 68) he stated that Pensacola was not in his Florida territory but is covered by a circulation road man of respondent who makes his headquarters at New Orleans and such individual visits that part of Florida in the same capacity as Briardy visited his Florida territory.

Respondent placed advertising in newspapers throughout the country and Mr. Whatmore, a vice-president of respondent, stated he was sure, "subject to check," that advertising had been placed in Florida newspapers in order to promote sales and increase circulation (R. 88). He also stated advertising displays were sent direct to dealers by respondent's New York office and were also included in individual magazine bundles (R. 82).

The magazines were distributed to news stand retail dealers in Florida by the American News Company and by Cooper News Company as independent wholesalers (R. 75-77). Average issue circulation in Florida of Look magazine alone is about 48,000 copies (R. 75).

In addition to news stand sales magazines were mailed to individual subscribers. Fifty per cent of individual subscriptions in Florida were procured through direct mail (R. 85).

Other subscribers in the state purchased subscriptions through agents and the orders were forwarded with cash (R. 85). It was a consistent practice to have subscription

agents in Florida. These agents were, in many cases, large companies operating out of New York or Philadelphia. They employed crews which toured the country and at times got into Florida. Crew members were employees of the subscription agency houses and such agents did not solicit exclusively for respondent but for many other magazine publishers as well (R. 92-93).

There were a small number part-time subscription salesmen or agents actually operating in Florida. These produced no more than 250 out of 10,000 subscriptions obtained annually. Subscriptions were subject to acceptance only by the respondent (R. 93, 99, 100).

Upon these facts the District Court (R. 106-107) ruled respondent was not at the time of the service of the federal summons upon Briardy doing business in the federal district of the Court and the Court did not have jurisdiction under Section 1391, sub-section C, New Title 28, United States Code, and entered a final judgment dismissing the action *in personam*. An appeal was duly taken to the Court of Appeals for the Fifth Circuit and the judgment of the District Court was affirmed in an opinion (R. 109-115) reported in 197 F. 2d (5th) 74. Russell, Circuit Judge, dissenting (R. 114, 115).

This Court granted certiorari herein on October 20, 1952 (R. 116).

SPECIFICATION OF ERRORS.

The Court of Appeals for the Fifth Circuit erred:

1. In holding that respondent was not doing business in Florida at the time of the service of summons.

2. In holding that the evidence presented no such showing of doing business as would justify the ex-

ercise of jurisdiction herein of the District Court in Florida.

3. In holding that this Court in *International Shoe Company* v. *State of Washington, Office of Unemployment Compensation and Placement,* (1945) 66 S. Ct. 154, 326 U. S. 310, did not change, but merely restated and clarified the old fiction and concept of doing business and overlooked the ruling of this Court in the case last cited that the practical test now followed seeks to determine not whether the acts of the corporate agent within the state are "a little more or a little less," but rather do the contacts as a whole of the corporation within the forum state make it just and reasonable to require a corporation to defend a suit there.

SUMMARY OF ARGUMENT.

The demands of Constitutional due process as regards a personal action against a foreign corporation have been met by the total contacts and activities of the respondent in the forum State of Florida, as the same make it reasonable to require the respondent to defend the libel suit brought there, and the terms "present" or "presence" or "transacting business" are used merely to symbolize those activities of the corporation's agents within the state which federal courts will deem to be sufficient to satisfy the demands of due process, and that the maintenance of the suit does not offend traditional notions of fair play and justice.

Petitioner contends that respondent's total activities within the state of Florida satisfied the demands of due process in that Briardy as a part of such corporate activities was "transacting business" for respondent as its agent in Florida under the definition of the Florida Statute

and that it would not have been a denial of due process to respondent for the federal district court in Florida to have retained jurisdiction to subject respondent to such suit *in personam*.

Petitioner's libel action arose and was filed within the state of Florida. The corporate activities of respondent were not irregular or casual, but through its two Florida road circulation or district men and other state activities were substantial and performed with regular, periodic frequency and connected in plan in an intensive operation and supervised sales promotion over the entire state of Florida in most of its towns and in all of its cities.

The libel action did not arise from any corporate dealings distinct from its Florida operations as the libelous statements concerning petitioner, a resident of Florida, were broadcast and were primarily affected by the large sale, circulation and distribution in Florida of the May 23, 1950, issue of the national weekly magazine "Look," charging plaintiff with being a member of a criminal gang called the "Mafia."

The Court of Appeals of the Fifth Circuit (R. 159-160) held herein:

> "* * * It is true that the approach of some of the recent opinions to the question under review has seemed less rigid in its requirements for jurisdiction than the earlier approach. We think, though, that they, and the new statute which embodies them, must be regarded, not as changing, but as restating and clarifying, the law. They certainly do not furnish warrant for the view pressed upon us by appellant that, *because of the activities of Briardy here*, the company can be said to be doing business in the state so as to be subject to suit there" (emphasis supplied).

The dissenting opinion (R. 160) of Russell, Circuit Judge, is as follows:

> "The majority opinion sets forth the facts of the case and also the appellant's contentions and citations of the applicable law. I think the authorities relied upon for reversal require that result since, in my opinion, the facts present show that the activities of the defendant (circulation and sale and the promotion thereof) amounted to 'doing business' within the State of Florida; the injury claimed, if existent, is connected with such activities; and the defendant had an agent in Florida upon whom service could properly be effected. Florida Statutes Annotated, Section 47.17 (5)."

It is to be noted at the outset in a comparison of the above quotations Judge Russell in his dissent did not limit or circumscribe the activities of the respondent in the forum state to the sole activities of Briardy as the majority of the Appellate Court did, but rested his conclusion that the company was doing business within the State of Florida because of the whole of the activities of the company "(circulation and sale and promotion thereof)" within the state of Florida.

Petitioner contends the Court of Appeals unduly restricted and narrowed the application of the case of *International Shoe Company* v. *State of Washington*, 66 S. Ct. 154, 326 U. S. 310, in holding that such case and the new federal statute quoted herein do not change but merely restates the old fiction and concept of corporate presence or transacting business, and that the practical test now followed by the Court under such case seeks to determine not whether the acts of a particular corporate agent within the forum state are "a little more or a little less," but rather do the activities as a whole of the corporation within the forum state make it reasonable to require the corporation to defend a suit there.

Petitioner contends the Appellate Court erred in failing to properly apply the International Shoe Company Case and such decision is also in conflict with the cases of the First,[1] Second[2] and Seventh[3] Circuits which have followed and applied the ruling of this Court in a manner that did not merely weigh the acts of the corporate agent served with process to find if the corporation was "present" within the forum state but rather did the activities of the foreign corporation as a whole make it reasonable to require it to defend a suit in the forum state.

ARGUMENT.

The two questions of law are so closely related that we will treat them together.

The federal summons with a copy of a complaint was served upon respondent by delivering same to Paul T. Briardy in his actual role under the Florida Statute of an "agent transacting business for it in the state," in the absence of a resident business agent, officers, directors, general manager, secretary, cashier, vice-president, president in their inverse order under the Florida Statute 47.17, F. S. A.

It seems unnecessary to go further for support of petitioner's contentions than the leading and ruling case of *International Shoe Company* v. *Washington*, 66 S. Ct. 154, 326 U. S. 310.

There, contributions to the Washington State Unemployment Compensation Fund were assessed against a

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[1]*Schmikler* v. *Petersime Incubator Co.*, 177 F. 2d 983, 990.

[2]*French* v. *Gibbs Corporation*, 189 F. 2d 781.

[3]*Consolidated Cosmetics* v. *D-A Pub. Co., Inc.*, 186 F. 2d 906.

Delaware corporation which took an appeal from a judgment of the State Supreme Court which sustained the assessment.

The Delaware corporation with a principal place of business in Missouri, had no office in Washington and made no contracts either for the sale or purchase of goods there. It had no stock of merchandise in the state, and made there no deliveries of goods in interstate commerce. The company did employ on commission several salesmen resident in the state to whom it supplied lines of samples, consisting of one shoe of a pair, for display to prospective customers. The salesmen on occasion rented permanent and temporary sample rooms and the company reimbursed them for rent so paid.

The salesmen's authority was limited to showing samples and to soliciting and transmitting but not accepting orders. When accepted, orders were shipped f. o. b. to purchasers. No salesman had authority to enter into contracts or to make collections.

Service of process was had upon one of the company's salesmen in the state and notice was also mailed to the company.

The company, clinging to those cases which hold mere solicitation insufficient to render a foreign corporation amenable to suit, contended, *inter alia*, that its activities within the state were not sufficient to manifest its "presence" there and that in its absence the state courts were without jurisdiction, that consequently it was a denial of due process for the state to subject appellant to suit.

In holding this contention untenable and in sustaining the state court, the Supreme Court, speaking through Mr. Chief Justice Stone said, in part, 326 U. S., pp. 316, 317, *supra*:

"* * * due process requires only that in order to subject a defendant to a judgment *in personam* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' * * * (cases cited). * * *

"Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, *Klein* v. *Tax Supers.*, 282 U. S. 19, 24, 75 L. Ed. 140, 143, 51 S. Ct. 15, 13 A. L. R. 679, it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in courts of the state, is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which the courts will deem it be sufficient to satisfy the demands of due process. L. Hand, Circuit Judge, in *Hutchinson* v. *Chase & Gilbert*, (C. C. A. 2d) 45 F. 2d 141. Those demands may be met by such contacts of the corporation with the state of the forum as makes it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate' of the 'inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection * * * (cases cited) * * *."

The Court, after discussing continuous and systematic activity of a corporation and the casual presence of the corporate agent and his conduct of single or isolated items of activities within a state, said, 326 U. S., p. 319, *Supra*:

"It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitive. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. * * *. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations. Cf. *Pennoyer* v. *Neff*, 95 U. S. 714 (and other cases cited) * * *.

"But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue * * * (cases cited) * * *."

As to service upon one of the salesmen in the state, it was said, 326 U. S., p. 320, *supra*: -

"We are likewise unable to conclude that the service of process within the state upon an agent whose activities established appellant's presence there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual."

Commenting upon the International Shoe Company case, the Court of Appeals, Second Circuit, in *French* v. *Gibbs Corporation*, 189 F. 2d 787, decided June 7, 1951, speaking through Circuit Judge Learned Hand said, *inter alia*:

> "Such an approach was *toto coelo* different from that of *Bank of Augusta* v. *Earle, supra*, 13 Pet. 519, 10 L. Ed. 274; it regarded the corporation, not as a fabricated jural person, but as a confederative venture to which, like all concerted activities, one can ascribe location only in places where its purposes are either planned or executed, although it is imminent in all of these. It does not indeed follow that a corporation should be subject to process wherever it is 'present' in that sense; but continuous activities, be they as little as one will, satisfy the necessity of that physical "presence" on which jurisdiction depends in a jurisprudence, territorially limited. Jurisdiction *in personam* in such a jurisprudence presupposes the power of the court to lay its hand upon the defendant, since otherwise it cannot compel his obedience; and it is not a solecism, but an act of grace, if it substitutes notice for a *capias*. For that reason it is also permissible to substitute for a *capias* notice served upon anyone who is conducting the local activities of a corporation outside the state which chartered it; and the only remaining question is whether to force it to trial in the forum of those activities is too unfair to be constitutionally defensible. The 'demands of due process * * * may be met by such contacts of the corporation with the state of the forum as make it reasonable * * * to require the corporation to defend the particular suit."

And further, the Court said:

> "(3) As we have said, courts have indeed often spoken as though a corporation's 'presence' depended upon the existence of those attending circumstances,

which make it just that the trial should be in the forum selected by the plaintiff; but it is not permissible, we believe, to regard this as only a shorthand for saying both that the corporation was engaged in *some* local activities, and that these were important enough to make the local trial fair. Obviously among the facts that will be relevant upon that issue is whether the liability arose out of events occurring within the state of the forum. Still more relevant and important will be whether the service was made within a short time after the corporation had discontinued its principal activities. Certainly when these two circumstances conspire, it is proper to demand of the defendant some showing why during the interval the situation had so changed that, although it was fair to force it to a trial before it reduced its activities, it had become unfair when the writ was served. In the case at bar the defendant showed nothing of the sort; it rests upon the thesis that, as soon as its activities ceased to be independently enough to subject it to service, it ceased to be so subject, until it should once more assume enough activities to make it justiciable. Our answer, as we have said, is that, *given any continued local activities the strict requirement of 'presence' is satisfied;* and that the rest is a matter of more or less" (Emphasis Supplied).

We also invite attention to *Consolidated Cosmetics* v. *D-A Publishing Co., Inc.*, 186 F. 2d 906 (7th Cir., 1951), where the defendant publishing company, a New York corporation, was sued for trademark infringement in a District Court in Illinois.

Service was had upon an official of the Kable Company. The Kable Company printed the defendant's magazines under contract in Mount Morris, Illinois.

The defendant's business activities in Illinois and its relations with Kable are detailed in the following excerpt from the decision in which the judgment of the District

Court, quashing the service of process, was reversed the Court saying:

"We think the facts of the present case are even stronger in support of jurisdiction on the non-resident corporation than they were in the International Shoe case. Here the New York corporation had made Mount Morris, Illinois, its place of publication in order to qualify with the postal department for mailing second class matter. It stored merchandise with its contractor, Kable, in Illinois, including paper and other materials to be used in printing the magazines. It sent to Kable drawings, reading matter, photographs and engravings, and employed Kable and thereby authorized it to set up the copy and to print the magazines in completed form. It contracted with and thereby authorized Kable from time to time, as the magazines were printed, to wrap them, to address them to defendant's consignees and to deposit them in the mail addressed to such consignees. These activities were not casual, isolated or disconnected but continuous and connected in plan and series. If we are to follow the Supreme Court, we cannot avoid the conclusion that such activities necessitated contacts which were such, when these magazines were published and placed in the mail at Mount Morris bearing an allegedly infringing mark, as not to exempt defendant from service of process in Illinois. We think that these activities, their extent and their continuity, their nature and their effect, were such inevitably as to constitute doing business in Illinois and, therefore, to render the defendant subject to suit in that jurisdiction.

"The functions of a magazine publishing company, obviously, include gathering material to be printed, obtaining advertisers and subscribers, printing, selling and delivering the magazines for sale. Each of these, we think, constitutes an essential factor of the magazine publication business. Consequently, if a non-resident corporation sees fit to perform any one of those essential functions in a given

> jurisdiction, it necessarily follows that it is conducting its activities in such a manner as to be subject to jurisdiction. * * *. Such a conclusion we think, is in accord with 'traditional notions of fair play and substantial justice' and is not, therefore, approval of undue process."

In the case at bar the appellee was performing at least some of the functions mentioned above, as well as others in addition, in the State of Florida.

Respondent at times through its paid writers gathered material in Florida (R. 92). It dealt directly by mail with magazine subscribers and prospective subscribers who reside in the state (R. 85). Agents operating in the state solicited subscriptions from people in Florida and collected subscription charges there (R. 85), (R. 92-93), (R. 99-100). It must necessarily have delivered its magazines to individual subscribers within the state. In addition, it employed two agents to deal directly and intensively with magazine retail vendors in Florida for the purpose of advancing, promoting and encouraging the sale of Look Magazine; to receive complaints from retailers and communicate these complaints to the appellee; to check and possibly rearrange vendor's displays of appellee's magazines; to furnish and set up advertising displays at retail outlets and generally to see that the appellee's interests in Florida, insofar as the sale of its magazines is concerned, were being well served in order to get the most efficient sale possible and to increase circulation (R. 47, 55, 80).

Was the quality and nature of the activity of the respondent's agents in Florida such as to satisfy due process requirements by subjecting respondent to an action *in personam* in that state after service of process upon an agent employed in the state by it for the purpose of seeing that respondent's interests there were being protected and well served?

We submit that it was. The main purpose of and reason for the activities of respondent's agents operating in Florida, and especially as regards Briardy, was to induce and encourage more and more people in Florida to purchase and read Look Magazine, the very vehicle carrying the alleged defamatory material of which petitioner complains.

The rationale that undertakes an estimate of the inconveniences and applies as a test whether or not the corporate activity has established sufficient contacts or ties within the forum state to make it just and reasonable from a standpoint of fair play to make the foreign corporation amenable to process is well demonstrated in the libel action herein.

While exercising the privilege of conducting its activities within the state respondent enjoyed the benefits and protection of Florida laws.

Suppose, for example, that respondent had sought by force to prevent Briardy from arranging displays of that issue of Look Magazine which carried the allegedly false and libelous matter designed to injure petitioner's reputation. Or suppose respondent had attempted to disturb such displays so that people in his community would not have been attracted to purchase and read that issue. He would have been prohibited from so doing by the laws of the state of which he is a citizen.

Certainly then, the "traditional notions of fair play and substantial justice" will not be offended if respondent is called upon to account for its allegedly unwarranted defamation of the petitioner's character in the place where that character and reputation is injured by acts of respondent, assisted and abetted by its agents in Florida.

Assuming, for the sake of argument, that respondent may, at least to some extent, be inconvenienced by being required to defend this suit in Florida rather than in Iowa or possibly New York. Is the estimate of this inconvenience such that the requirement to defend in Florida will offend "traditional notions of fair play and substantial justice"?

An answer in the negative is clearly indicated by the activity of respondent. It must have known, when it published matter defamatory to the character and reputation of the appellant and caused the vehicle for this alleged libel to be circulated and published in petitioner's home state and city, that he would suffer damage there as the result of such publication and distribution.

When respondent set out deliberately to injure the appellant in his home it should have been ready to defend its actions there.

If respondent is required to suffer any inconvenience as a result of having to defend this suit in Florida it is an inconvenience which it might well have anticipated.

To require petitioner to bring this suit miles away from his home where he has been damaged in some jurisdiction where he is unknown; some place of the appellee's choosing, would indeed offend our "traditional notions of fair play and substantial justice."

As was said in *Clements* v. *Macfadden Publication, Inc.*, 28 Fed. Supp. 274:

> "To carry the present line in holdings to any greater extent than they now exist could easily result in a publication two thousand miles away destroying a man's reputation, whether he be great or small, and requiring him to come to unfriendly territory, perhaps, to effect his vindication in the courts of justice.

For this reason and for others it is manifest that the shipment and circulation of printed documents should hardly be grouped and classed with ordinary articles of merchandise."

While we have stated that we consider it unnecessary to go further back for authorities supporting our contention than the case of *International Shoe Company* v. *Washington, supra,* especially in view of the confused state of the law on the question here involved which existed prior to that decision, as outlined by Judge Hand in *French* v. *Gibbs Corporation, supra,* we should like to invite the attention of the Court to the case *International Harvester Co.* v. *Kentucky,* 234 U. S. 579, 58 L. Ed. 1479, and to the opinion of the Court delivered by Mr. Justice Rutledge in *Leo French* v. *Louisville Cement Co.,* 134 F. 2d 511, both of which support the contention which we make here.

The Supreme Court of Florida has construed the statute governing service of process in the state in *George A. Hormel & Co.* v. *Ackman,* 158 So. 171.

In that case the plaintiff in error, a foreign corporation, was served by delivery of summons to a salesman residing in Florida. The salesman was employed to solicit orders only, subject to acceptance by the company. In some, but not all, instances he collected for orders taken and transmitted the collections to the company. Deliveries of orders were shipped from outside the state.

The Court held that the salesman was the plaintiff in error's "business agent, resident in the State of Florida." This classification is a higher order than "any agent transacting business for it in the State" as such agent is not required to be a permanent resident of the State.

Justice Ellis (concurring specially), 158 So. 173, *supra,* stated:

"By that course of business the corporation manifested its presence within the state and Waseman's authority * * *. In which circumstances he was a business agent of the corporation resident in this state * * *"

However it is not necessary for us to show Briardy was of the next high order of "business agent, resident in the state" as the facts show conclusively respondent manifested its presence within the state by an "agent transacting business for it in the State," within the Florida Statute.

It may be that Briardy was not resident in the State of Florida although, since he had no residence anywhere, it would seem that he was a resident in the State of Florida while he was actually present in that state. In any event, if he was not a resident his activities were such as to constitute him an "agent transacting business" for the appellee in Florida.

The activities of Briardy were intensive, on a regular, planned itinerary that carried him into almost every part of Florida. His counterpart in and about Pensacola and surrounding territory performed in a like capacity. In the cities Briardy visited about forty dealers or stores a day performing a multitude of duties with dealers, wholesalers, the New York office and advertising material that kept him very busy not merely checking but using his discretion in arranging displays, curing complaints, promoting sales of three national magazines of respondent and turning in many written reports to respondent's office in New York.

He was highly regarded by respondent as a responsible corporate agent to the extent (R. 58) he was ordered into the State of Florida while on his scheduled district itin-

erary and to see on behalf of respondent that the sale of a new publication of respondent's called Flair was being promoted properly in the Florida territory during the winter season of 1951.

In the words of Mr. Justice Day in *International Harvester Co. v. Kentucky*, 234 U. S. 579, 589:

> "We are satisfied that the presence of a corporation within a state necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the state, although the business transacted may be entirely interstate in its character."

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment below should be reversed.

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